

THE DIGITAL FUTURE OF HEALTHCARE:  
EMERGING TRENDS IN TELEHEALTH  
TECHNOLOGY

PANELISTS:

TRAVIS LLOYD, *BRADLEY ARANT BOULT CUMMINGS LLP*  
NATHAN KOTTKAMP, *WALLER LANSDEN DORTCH & DAVIS  
LLP*

NESRIN TIFT, *BASS, BERRY & SIMS PLC*

*Moderated by Deborah Farringer, Faculty Advisor*

[edited for reading]

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**Casey Goggin:** At this point, we're going to move to the panel portion of today's event. And so, with that, I will introduce our moderator this afternoon, Professor Debbie Farringer. Professor Farringer is the faculty supervisor for the Belmont Health Law Journal and the Director of Health Law Studies at Belmont College of Law. She also serves as the faculty supervisor for the Health Law Journal and the coach of the moot court transactional team. Her scholarship explores operation and impact of health laws and health policy on providers and suppliers. And most recent scholarship concentrates on the unique challenges facing health care industry in the area of cyber security. Her scholarship has been published in the Brooklyn Law Review, Nevada Law Review, Seattle University Law Review, and a bunch of others. Prior to joining faculty at Belmont, Professor Farringer served as Senior Associate General Counsel at the Office of General Counsel for Vanderbilt. And she worked primarily at the Vanderbilt University Medical Center. Prior to that, she worked as an associate at Bass, Berry & Sims in Nashville in the firm's health care regulatory group and she graduated summa cum laude from the University of San Diego. And then after that received her J.D. from Vanderbilt University School of Law, where she was a member of the Order of the Coif. Immediately following law school, she completed a judicial clerkship for Judge H. Emory Widener, Jr. of the United States Court of Appeals in the 4th Circuit. At this time, I'm going to kick it over to Professor Farringer for our panelists.

**Professor Farringer:** Alright. Thank you so much to everybody. So I'm going to admit, I think I have turned off one of our panelists. Camera is here, so hold on. Nathan, here, let me get you turned on. Let's see here. I think that should do it. Alright so we've got, I want to get them introduced here really quick so we can get to some questions. We've got three attorneys here that all practice at law firms here in Nashville that I'm quite excited to have with us today. We've first got Travis Lloyd. He's a partner at Bradley Arant Boult Cummings and Travis is in the firm's health care practice group. He focuses upon complex regulatory matters, such as fraud and abuse, provider enrollment and reimbursement, and health care information, privacy, and security. Travis graduated cum laude from Davidson College where he was elected to Phi Beta Kappa. He proceeded to earn his law degree from Georgia State College of Law where he graduated magna cum laude. Additionally, he holds a public health degree from Harvard University, where he focused on health law and policy. We've also got Nathan Kottkamp, who is a partner at Waller Lansden Dortch & Davis. Nathan advises on compliance with both federal and state health care regulations, as

well as day to day operational issues. He earned a designation as a certified information privacy professional and assists clients with HIPAA and other data security matters. He earned his bachelor's degree with high honors from William & Mary and his master's degree in bioethics from the University of Pittsburgh. And he earned his law degree with a certificate of advanced study in health law from the University of Pittsburgh School of Law, graduating magna cum laude and Order of the Coif. And lastly, I am excited to welcome Nesrin Tift from the law firm of Bass, Berry and Sims. She advises clients with health care fraud and abuse issues, compliance operations, telemedicine initiatives, and health information, privacy, and security. She's also an active member of the Health Care Compliance Association. She earned her bachelor's degree from Harvard University, graduating magna cum laude and her master's from London School of Economics, and went on to earn her law degree from Vanderbilt. So, we've got a lot of degrees on our panel. I'm excited to talk to all of you about telehealth today. So, I'm going start just with a big broad question about what you're seeing. Given all of the regulatory changes we've just heard about, we've heard the clinician side, we've heard the legal side of sort of the deregulation that's been happening. What are some of the most common legal issues you're seeing in your practices during the pandemic? What are clients calling you about? What are they nervous about? Nesrin, why don't we start with you.

**Nesrin Tift:** Thanks Debbie. Glad to be here with these wonderful panelists. So, the question, you don't specifically say telehealth. I assume that's what you implied.

**Debbie Farringer:** Yes.

**Nesrin Tift:** I think it's fair to broaden it out just a tiny bit because as Nathan and Travis know, sort of the legal challenges and implementing in many cases very rapidly telehealth methodologies, can pose a challenge where that infrastructure is not already in place, and have done so. I think what further compounds that is that you also have for a lot of provider organizations, teleworking. Right, you have telehealth and then you have people working remotely and so you have this sort of unique situation where you have practitioners being able to conduct visit in their homes, patients in some cases in their homes. And I think for a lot of our clients it was an overwhelming scenario to figure out how to get everybody up to speed. I was very heartened to hear Dr. Charles example of the med. students who took it upon themselves to help patients on board in telehealth because that is hugely impactful. And I think when we're talking about privacy and security the patients have to play a role in

that and we have to be able to ask them to do that and to help remind them about observing safeguards on their end and being in a private place. You know, if you do have the ability security features or privacy modes to do that. And the other thing I'll say is I think that there has been an ongoing challenge in access to data during this time. I think there were misconceptions when the pandemic started maybe they're still there with regard to public health reporting. And you know what might be perceived as kind of you know, HIPAA is off the table right now we have all these waivers, you know, basically you can tell anyone you can notify your workforce when a patient has tested positive or when a workforce member has tested positive for COVID and that's not necessarily the case in a lot of ways. Although it was CR's enforcement discretion that has been impactful when it comes to telehealth. HIPAA has permitted disclosures of PHI even for public health purposes are still pretty limited and so I've spent a lot of time helping providers navigate that sort of public health very valid need for information balanced against privacy and really what HIPAA allows which you know it again, looking at again permitted uses and disclosure of PHI, really nothing changed there during the pandemic, it was only on the sort of telehealth side.

**Professor Farringer:** Thanks, Nathan did you want to go next?

**Nathan Kottkamp:** Yeah. I think the thing I've seen the most over the last several months is the change in mindset. Some of this is just driven by desperation but a year ago, if I had a client ask me about telehealth, there was a lot of research and measured approach and we don't to get in over skis and all that kind of stuff. And for any number of reasons, once COVID hit I think my clients and others just dove right on in and it's kind of like circumstances and consequences be damned, we'll figure it out on the back end. And so, for some of them we're trying to pry things back or trying to say what kind of documentation are you getting from your patients regarding the limitations to telehealth and that you know it's not perfect and all these sorts of things, but it's really it's the cows out of the barn situation and now it's just evaluating what's out there in the field. I think that's probably the single most significant thing that I've seen them on my clients.

**Professor Farringer:** Thanks, Travis what about you?

**Travis Lloyd:** Thanks Debbie and thanks to everyone for inviting me to participate. You know, the past 7 months have been crazy for everyone no matter what you do or where you are. I think as a healthcare lawyer focusing on these issues, my practice has followed sort of us an arc that's probably familiar to my co-panelist which is

in the early days it was sort of the work focus on the possibility of obtaining one off waivers then it shifted to interpreting blanket waivers and now it's more or less imagining life after the waivers, you know, [when] we're no longer in hair on fire mode. But we're seeing a lot of questions about what the world looks like post-pandemic. What's the coverage environment? What payment policy will stick? How do we anticipate the end of this broad government exercise of enforcement discretion whether on the Privacy and security front or the fraud and abuse front? So, ultimately we're often now being asked to help healthcare providers both institutional healthcare providers and technology services providers to really think through their exist strategies from this very unique regulatory environment and to also you know, do a little bit of crystal ball reading.

**Professor Farringer:** Yeah, it's one thing you pointed out that I thought would be interesting to talk about. I think all of you are well-versed in fraud and abuse issues, there was a recent settlement, actually 350 medical professionals submitting fraudulent claims related to telemedicine,<sup>1</sup> specifically the really high settlement, what are you seeing on that front so as we sort of are your clients nervous are they anticipating a big change in this sort of fraud enforcement that's going to come and kick it on the back end? Travis, you mentioned it slightly, what do you think is coming down the pike is this just one of what's going to be a new log of a fraud issues that are coming up?

**Travis Lloyd:** Yeah, I guess I'd answer that in a couple ways. I mean first of all I think there is a huge gulf between the world of sham internet pharmacies and DME suppliers the like which are a related subject of that National Health Care fraud takedown<sup>2</sup> that you mentioned and legitimate healthcare providers or telehealth platforms. I don't think it's the end of the use of. I think we see how stretch the term Telehealth becomes. Let me see how the DOJ uses it in his prosecutions it's not exactly the same thing that at least most of us who aren't white collar attorneys are spending our time on. I do think though that anytime you [have] disasters and emergencies, [it] always invite[s] unscrupulous actors and that is certainly the case when you have as in this case huge sums of government spending. So, the idea that there will be scrutiny I think is beyond dispute, I think everyone expects that also this is coming of course at the time

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<sup>1</sup> Dept. of Justice, *National Health Care Fraud and Opioid Takedown Results in Charges Against 345 Defendants Responsible for More than \$6 Billion in Alleged Fraud Losses* (Dept. 30, 2020), <https://www.justice.gov/opa/pr/national-health-care-fraud-and-opioid-takedown-results-charges-against-345-defendants>.

<sup>2</sup> *Id.*

when we're in a huge push to modernize the core fraud abuse laws, the Stark Law,<sup>3</sup> and the Anti-Kickback Statute.<sup>4</sup> And in all likelihood those final rules will create more space for renovation more flexibility for value-based care arrangements which will include services delivered through telehealth platforms we don't know how exactly that is going to turn out and it's really essential to keep up with those developments. But I don't think that the sort of headline-grabbing four and a half billion-dollar announcement the other week should be construed as sort of a condemnation of kind of legitimate telehealth platforms that have scaled up quickly and aggressively, like Nathan was saying, during this time of sort of relaxed enforcement. Nevertheless, that's not to say you should proceed without worry, I mean these are core concerns [and] they will remain core concerns. And so, you always [have] outside counsel and a clear understanding of the flow of funds and the movement of patients through the system and make sure you're within the realm of responsible risk-taking

**Professor Farringer:** Yeah, Nesrin on that front, on sort of the broad everything's waived, what sort of advice are you giving your clients about how to keep the wheels on and make sure that they're sort of approaching things appropriately but also being able to use innovation and take advantage of some of the waivers?

**Nesrin Tift:** Yeah, sure. So I echo what Travis said and I think we would both be considered lucky that we tend to be advising the clients who are truly trying to do the good faith provision of telehealth and Nathan I'm sure the same way but even then, even with the good faith provision of telehealth, which is you know precisely to what the OCR enforcement discretion applies you have the possibility of practices that have been put in place, as Travis said, in that kind of hair on fire mode you need to reach these patients, we need to figure out a way to keep capacity open in our hospitals or protect people who might be more at risk from having to leave their home and then at some point when you're not in hair on fire mode and you realize you have large amounts of data, of PHI, being transmitted through Facetime, through Zoom, you know and you availed yourselves of the enforcement discretion which is perfectly fine you still have consequences particularly as the public health emergency wanes. And we don't really know what it would look like as far as what as what step OCR will take in ramping back up enforcement, but we also know that things that historically are on OCR's radar like lack of HIPAA security risk assessment blocking access to PHI you know you got telehealth visits which may be part

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<sup>3</sup> 42 U.S.C. §1395.

<sup>4</sup> 42 U.S.C. §1320a-7b(b).

of the designated records set and are going to be subject to individuals access requests and we also know OCR, and I know I got one 30 minutes ago and I got a notification that OCR is coming down with another round of penalties in the right to access initiatives so I don't think that OCR is just going to stop you know looking at these issues. So, I think there needs to be some kind of thoughtful, hopefully now that hair on fire mode is hopefully no longer present, documenting risk decisions that are made, and sort of documenting how your organization arrived at a solution or determined that something, even if there were risks that the risks were reasonable and appropriate in light of the public health emergency, and kind of what steps you put in place going forward in your interaction with these vendors and with your workforce.

**Nathan Kottkamp:** Yeah, and I'll just add I think it's important to recognize that OCR or any agency's enforcement discretion is not equivalent to compliance inception, so you still have to do things like using Zoom for a telehealth visit without any extra additional security. You still need to be considering that and putting it in your risk assessment. Saying, look I don't have any other option my plan is to buy a better platform in three weeks or whatever the case may be. But you don't just get to say well I don't have to do anything at all because the OCR is not enforcing things. So, I just want to be sure that distinction is very, very clear because I think you can get very easily lulled into a state of complacency when everything lifts you are sort of back in that problem I was saying earlier which is all the stuff you got to figure out how do you undo it when you should have been taking incremental steps all along.

**Professor Farringer:** Yeah, so we got just like a minute or so here left, because I want to release everyone on time. But, to that point Nathan I mean, can you tell us your thoughts on what will stay and go and in terms of some of the privacy, you do a lot with the privacy regulation. It has allowed a lot of access that was previously not allowed. Do you see some changes going forward?

**Nathan Kottkamp:** Yeah, I think we're going to see what, more than anything, some loosening of the rules about which platforms are allowed to be used. And I think there's always a possibility that FaceTime or Zoom is going to get compromised in some way, but I think we're probably seeing what this much of it is going on around the globe right now. Maybe that's not that big of a concern, we're going to worry about other things about is the care appropriate as opposed to is the platform appropriate. That's my guess. Hard to know for sure though.

**Professor Farringer:** Nesrin or Travis, any last comments before I take it back to our team to thank everyone for coming.

**Travis Kottkamp:** Yeah, no, I appreciate the chance to participate. I think that Dr. Charles said it well. You know, that this is clearly here to stay and I think beyond outside counsel perspective it's just as important as you're working with clients that you build scalable models that haven't been denied for increase coverage. Because I do think that from a reimbursement perspective, we're just going to continue to see expanded coverage modifications in coverage parody and payment parody laws along the lines of what Professor Tovino was saying. It's here to stay and it's just a matter of keeping up with the waves of change.

**Professor Farringer:** Well, thank you so much, Nesrin did you have any last-minute comments?

**Nesrin Tift:** I agree.

**Professor Farringer:** Alright, thank you so much to our panelists. I am going to now kick it back to Paige I think, who is going to tell us a little bit about what's up next for the Journal.

**Paige Goodwin:** Yeah, thank you everyone for joining us. My name is Paige Goodwin, and I am the Symposium Director and I just wanted to quickly tell you about our upcoming event this Spring. So, in February, we are hosting our health law symposium which will also be exploring emerging trends in health care technology. It will essentially just be an extended version of what we had today. We will have multiple panels, several academic speakers, and people will be able to earn up to three CLE credits. As of right now we are planning on this to be held virtually, but fingers crossed that things get better and we can all be in person. But I will be sending out an email with more about this soon so be on the lookout for that and I hope to see you there. I'm going to hand it over to Joey, our managing editor for closing things out.

**Joey Kennedy:** Thank you Paige, like Casey mentioned earlier we will be sending a CLE form out via Google forms to the email that you registered with. So, once you receive all those responses we will submit all the attendee information to the CLE commission. We heard there could be a slight delay with that, with them getting innovated with all of these remote and other CLEs. So, we will get those sent in. And I also want to thank our presenters and panelists again for very timely and interesting discussion today. It just seems that telehealth and other remote forms of technology are consuming every day and it is interesting to see what is going on behind the

scenes. I would again like to thank Paige Goodwin, our director for the symposium. She has done so much work on this event and we are very thrilled with the way it has gone today. We appreciate all of you for making time to attend this event today, we are thrilled to have more than double our attendance rate from last year. And we know that the Tennessee Bar is hosting its annual health law forum this week, so we really appreciate you for being with us for this hour. And with all of that be on the lookout for that CLE form in your email and we hope to see you all again this spring for our annual symposium.

**Professor Farringer:** Thank you so much.

**Casey Goggin:** Thank you, everyone.